

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

**Docket
No. 77-1491**

**In The
United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

- v -

**JAMES W. McGRATH, JON N. ENGLISH and RAYMOND
D. MASCIARELLI,**

Appellants.

**On Appeal From The United States District Court
For The Northern District of New York**

**APPELLANTS' REPLY BRIEF
McGrath, English and Masciarelli**

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APPELLANTS' REPLY BRIEF
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INTRODUCTION

Throughout its brief, the Government has misconstrued appellants' arguments, especially in its assertion that appellants do not contend that the failure of the District Court below to state its essential findings, as required by F.R.Crim.P. Rule 12(e), is reversible error. While this and other misreadings will be clarified, infra, appellants wish first to bring to light some parts of the record which the Government has ignored.

Judge Munson, in the District Court below, concluded that the issue before him in the suppression hearings was whether the tapes had been sealed "immediately". Gov't A. 152 reads as follows:

The Court: Well, we should continue with the hearing, however, I think that the hearing should be restricted to the basis of the hearing, which as I understand it, is the alleged unreasonable delay or lack of immediacy on the part of the government in having the tapes sealed.

This characterization of the issue, as perceived by the Court below, was reinforced on page 22 of the January 21, 1977 hearing transcript, which reads as follows:

The issue is . . . whether or not pursuant to the statute allowing the wiretaps, these tapes were delivered and sealed by the Court within a period of time that could be considered immediate.

Thus, the only implication involved in the decision of the Court below denying suppression is that of a finding of immediacy. Given the fact that the Government concedes the accuracy of the delays involved in the sealing of the tapes (Gov't Br. 34), the rule that sealings performed more than one or two days after expiration of a wiretap are not "immediate" and require explanation comes into play. United States v. Vazquez, 605 F.2d 1269, 1278 (2d Cir. 1979); See also, United States v. Sotomayor, 529 F.2d 1219, 1221 (2d Cir.); cert. denied, 99 S.Ct. 2842 (June 4, 1979).

Obviously, the court below found nothing relating to "explanation" and at best found "immediacy" in the sealing of tapes. This, we submit, is reversible error under the authority of Vazquez, supra, and Sotomayor, supra.

Second, the Government claims that two days were required to process each set of tapes for sealing and each period of delay included one weekend. Gov't Br. 36. There is no basis in the record for any such interpretation of this testimony. Throughout the hearings it is clear that both Agent Hazelwood and Judge Munson knew that the sealing delays ran from three to eight days.

Finally, the Government's brief boldly states that "the delays of three to eight days in sealing the tapes were reasonable and were satisfactorily explained . . . [and] the district court properly denied the defendants' motion to suppress on

that ground. . ." Gov't Br. 36-37. On the contrary, no such finding appears anywhere in the record.

POINT I

RULE 12(e) OF F.R.Cr.P. REQUIRES THE COURT TO STATE ITS ESSENTIAL FINDINGS ON THE RECORD AND A FAILURE TO DO SO IN DENYING THE SPEEDY TRIAL MOTIONS AND THE SUPPRESSION MOTION REQUIRES A REVERSAL AND REMAND TO THE DISTRICT COURT FOR THE PURPOSE OF MAKING SUCH FINDINGS.

A. SPEEDY TRIAL MOTIONS

The Government incorrectly reads appellants' argument that there are no disputed facts. In point of fact, sharp factual issues arose during the course of appellants' arguments disputing the clerk's computations of excludable time and the integrity of the Government's various Notices of Readiness.

Given the Government's computations, which are at variance with both the clerk's and the appellants' computations, highly critical factual issues are presented to this Court unassisted by any findings made by the Court below. Gov't Br. 8-10. By doing so, the Government concedes the existence of factual issues which can only be resolved, in the first instance, by a reversal and remand to the court below for a determination of the facts. United States v. Scafo, 470 F.2d 748 (2d Cir. 1972); United States v. Pollak, 474 F.2d 828 (2d Cir. 1973).

B. SUPPRESSION MOTION

Although the District Court stated that ". . . a written opinion will follow . . ." (A. 162), no findings of fact or conclusions of law were made by the District Court. While the Government concedes that the District Court did not state its essential findings on the record, it suggests, nonetheless, that there is no serious dispute as to the facts. Gov't Br. 37. Throughout its brief, the Government construes the failure of the lower court to find the facts as a matter of harmless error or at best a technical matter. As noted above, however, a correct analysis requires objective factual determinations by the lower court as to the critical factual basis for any ruling involving the motion for suppression being sought for conceded delays, which then required determinations as to whether or not those delays were satisfactorily explained.

Contrary to the Government's contention that there is no serious dispute as to the facts, it is well to point out that the record of the hearings runs well over 450 pages and covers six days. In these circumstances, then, the lack of a detailed ruling is ground for reversal since appellants are prejudiced by the absence of an opinion. The issue, then, is not solely a question of law. With the concession by the Government as to the extent of the sealing delays, the situation here is like that found in United States v. Robertson, 606 F.2d 853 (9th Cir. 1979).

(District Court's failure to make essential findings prevented the Court of Appeals from determining whether any exigent circumstances may have justified the warrantless entry and search of a private residence.)

CONCLUSION

The judgments of conviction should be reversed or in the alternative, the matter should be reversed and remanded to the District Court for findings as required by Rule 12(e) of the Federal Rules of Criminal Procedure.

Dated: March 14, 1980.

Respectfully submitted,

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Affidavit of Service

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cc: **Dante M. Scaccia, Esq.**